PETITIONER'S BRIEF.

STATEMENT.

Petitioner filed a complaint (Trans. 2-6; Rec. 3-9) in the District Court for the Northern District of Illinois seeking relief under the Copyright laws (U. S. Code, Title 17). In accordance with the Copyright Rules, he filed copies of his four copyrighted works (Trans. 36-109; Rec. 32-83), and copies of two alleged infringing publications (Trans. 7-35; Rec. 10-31; Trans. 140-164; Supplemental Rec. 19-26). Defendant below, respondent here, seasonably filed a motion to dismiss (Trans. 129, 130; Rec. 94, 95) which motion was sustained by Judge Barnes and the complaint dismissed (Trans. 132, Rec. 100). The trial judge filed a written opinion or memorandum (Trans. 131; Rec. 98), and, later on, overruled a motion for new trial (Trans. 133; Rec. 105). Since the cause was disposed of on the pleadings, no evidence was taken, and the record is accordingly simple and short. Probably 90 per cent of the printed transcript comprises the exhibits of copyrighted books and the two publications admittedly issued by respondent which petitioner claims to constitute infringement of his works.

Preliminary Suggestions.

Before proceeding to a discussion of the issues involved petitioner will clarify some of those issues by a short resumé of certain historical and actuarial matters which are of more than mere academic interest and which have a direct and important bearing upon the controversy between the parties to this appeal.

The business of life insurance, while not as old as fire or marine insurance, has developed in England ever since the Stuart dynasty and in this country since prior to the American Revolution. From time to time life insurance companies have become insolvent, and have been wound up in various types of liquidations and receiverships. In this country insurance is not commerce (U. S. C. A., Const. Art. 1, Sec. 8, clause 3, note 124), so the Federal Government cannot administer these companies under the commerce clause of the constitution, and, as a matter of legislative policy, has deliberately excluded insurance companies from the operation of the bankruptcy laws. (Bankruptcy act, sec. 4, *In re Peoria Life Ins. Co.*, 75 Fed. (2nd) 777). Thus the wind-up of insolvent insurance companies has been left to the several states, complicated in nearly every instance by the necessity for primary proceedings in the state where the company's charter was issued and ancillary proceedings in every other state where the company was doing business, obviously producing many elements of conflict between states, unnecessary duplication of expense, inequalities between policyholders, and other evils.

When a mercantile or manufacturing business fails, its assets can be turned into money, and the money thus realized distributed pro rata amongst creditors, but the very nature of the business of life insurance makes the wind-up of an insolvent life company, a difficult and complex proceeding, wholly unlike the wind-up and liquidation of other types of business concerns. For example, some living policyholders have paid for their insurance in full, to mature into a death claim only at some indefinite future date. Other policyholders have paid something into the fund, but will become entitled to benefits only upon the happenings of conditions subsequent, such as payment of future premiums, and, while both of these classes of policy-

holders can have their policies evaluated, many policyholders do not want the cash values of their contracts but prefer that the contracts be kept in force because their uninsurability makes it difficult or impossible to procure other insurance elsewhere. Some policyholders, too, have bought and paid for annuities and expect a periodic remittance from the company. To build up an agency corps requires years and involves a company in heavy expense, and if the agency force is allowed to scatter, an asset the value of which cannot be stated in terms of money is irretrievably lost. Other insurance companies have become reinsurers or reinsureds, and must be considered sometimes as debtors and sometimes as creditors. These and many other factors well known to insurance lawyers and actuaries, show that the wind-up of a life insurance company is a proceeding distinctly and emphatically *sui generis*.

As is well known, the income of life companies is derived from two principal sources, payments made by policyholders for premiums and otherwise, and income on investments. The depression of the '30s resulted in a material diminution of investment income, plus a shrinkage in the value of many investments, particularly railroad bonds, certain types of real estate loans, and the like, and the failure of most companies that did go under was due, not to any increase in expenses and claims that had to be met out of current income, but to the fact that current income was insufficient to carry its own burden, plus the additional and unexpected ones of absorbing or making good capital losses due to investment value shrinkage, augmented as it was by the heavy and unprecedented demands made upon the companies by policyholders desiring cash loans or cash surrenders—a condition much like runs on banks. Plaintiff perceived that if the companies in trouble could only have their liabilities readjusted and be left alone they would in time be completely rehabilitated out of their own assets,

and future premiums paid by continuing policyholders, and plaintiff's proposal for each of the four companies which he analyzed and for which he reduced his suggestions to written or printed form and which were copyrighted, had this fundamental idea in view.

Prior to about 1933, the only methods known to wind up a failed life insurance company were to liquidate the company and pay off the various obligations in cash, or to reinsure its risks in some other company, leading to endless squabbles as to whether or not policyholders and claimants were being fairly dealt with, but in any case, the policyholders could realize only what the assets of the failed company would bring, less the inevitable expenses and losses due to the fact that the conversion into cash of the assets was inevitably under the unfavorable conditions of any forced sale or conversion of assets to say nothing of the loss due to the destruction of the business as a going concern. So long as no major company failed the evils attendant upon these forced wind-ups were of only minor consequence and usually did little more than furnish a cogent argument to a prospective policyholder in favor of keeping out of small companies and taking insurance only in the giants.

In the decade 1930-1940, however, there were many failures of life companies. In the trial court alone two life companies were wound up in general chancery receiverships, and in addition, eight or ten Illinois life companies were wound up in the state courts under the Illinois liquidation act of 1925 then in force. Missouri, Iowa, Ohio, Michigan, Kentucky, Louisiana, California, and other states, contributed to the total of life insurance casualties and this epidemic of failures set petitioner to thinking about ways and means of stopping the loss of policyholders and impairment of policy values, inevitably occa-

sioned by the methods of liquidation and reinsurance previously employed.

Petitioner, an insurance actuary and executive of thirty years' experience, having given the matter a great deal of study and attention, wrote, published, and copyrighted four books to show how a failed life insurance company could be *reorganized and rehabilitated* out of its own assets, *without the contribution or investment of any new capital.* The completely novel suggestions embodied in these books are of a Receiver, or Liquidator, of a defunct life insurance company organizing a new mutual type of life insurance company, and paying in the working capital and surplus of the new company out of the assets in his hands as Receiver of the defunct company and then reinsuring the business on an adjusted basis and transferring all the assets of the defunct company into the new company, virtually "lifting it by its own boot straps," from insolvency to solvency without any outside financial aid. His books described not something like a mathematical theorem or logical syllogism, applicable to all cases, but each book was adapted to the necessity of its particular case. For each of four failures, in Chicago, Peoria, Detroit, and Cincinnati, respectively, he prepared a mutualization and rehabilitation proposal. These were published and copyrighted, and while there was some matter common to all, each proposal contained some few portions found in it alone and not in the others.

In 1936, the Pacific Mutual Life Insurance Company of California became, or more properly was, adjudged insolvent. It is beyond the scope of this brief to suggest why that company became involved or what was necessary or desirable to rehabilitate the old company, and it suffices to say that the Insurance Commissioner of California, proceeding under a statute of that State, had himself appointed as conservator of the company. In that capacity, he entered

into a contract with a new company (which he organized and for which he subscribed and paid in out of the assets of the old company in his hands, all the capital and a starting paid in surplus fund) bearing the same name as the old minus the clause "of California", whereby the assets of the old company were transferred *in toto* and *en masse* to the new, and the rights of policyholders, claimants, agents, and reinsurers were covered by this contract. The new company, herein respondent, published and circulated many thousands of copies of the plan and of the contract (the statutory term employed in the statute is "made", U. S. C. A. title 17, sec. 25, clause 2), and the plan and contract contained much material, as petitioner will hereinafter show, appropriated from his copyrighted proposals.

PROPOSITIONS OF LAW RELIED UPON AND CITATION OF CASES.

I.

A copy of a "substantial part" of a copyright work constitutes an infringement, and it is not necessary that the whole composition be rifled.

Ansehl v. *Puritan Co.*, 61 Fed. (2nd) 131, 137.
United Dictionary Co. v. *Merriam*, 208 U. S. 260, 52 L. Ed. 478.
Perris v. *Hexamer*, 99 U. S. 674, 676.

II.

A plaintiff in a copyright suit is not entitled to be protected in his ideas but is to be protected in his expression of those ideas, and his directions for carrying those ideas into execution.

Ansehl v. *Puritan Co.*, 61 Fed. (2nd) 131, 137, 138.
Holmes v. *Hurst*, 174 U. S. 82, 86, 43 L. Ed. 904.
Edwards & Deutsch Litho. Co. v. *Boorman*, 15 Fed. (2nd) 35, 36 (C. C. A., 7th Cir.).

III.

Copyright may be justly claimed by an author who has taken existing materials from sources common to all writers and arranged and combined them in a new form.

Edwards & Deutsch Litho. Co. v. *Boorman*, 15 Fed. (2nd) 35, 36 (C. C. A., 7th Cir.).
Lawrence v. *Dana*, Fed. Cas. No. 8136.
Emerson v. *Davies*, Fed. Cas. No. 4,436.

IV.

In deciding the question of infringement, the obvious thing to do is to compare the copyrighted work with the alleged infringement.

Edwards & Deutsch Litho. Co. v. *Boorman,* 15 Fed. (2nd) 35, 36 (C. C. A., 7th Cir.).

V.

A defendant may appropriate the ideas of a copyrighted work and express them in his own language, but may not copy an author's arrangement of material and language, and thereby create substantially the same composition in substantially the same manner, without subjecting himself to liability for infringement.

Anselil v. *Puritan Co.,* 61 Fed. (2nd) 131, 138.

VI.

A motion to dismiss the complaint in a copyright suit necessarily concedes that similarities between plaintiff's and defendant's works were the result of use by the defendant of the plaintiff's work, and, therefore, constitute an infringement.

Anselil v. *Puritan Co.,* 61 Fed. (2nd) 131, 138.

VII.

Many rules of decision applicable in patent cases are likewise applicable in copyright cases.

Bobbs-Merrill Co. v. *Straus,* 210 U. S. 339, 52 L. Ed. 1086.

Caliga v. *Inter Ocean Newspaper Co.,* 215 U. S. 189, 54 L. Ed. 152.

VIII.

In a patent case (*ergo* in copyright ones) "it is the last step that wins."

Washburn & Moen Mfg. Co. v. *Beat 'Em All Barbed Wire Fence Co.*, 143 U. S. 275, 54 L. Ed. 154.

IX.

Anticipation as such can not invalidate a copyright.

Sheldon v. *Metro-Goldwyn Corp.*, 81 Fed. (2nd) 49, 54.

Weil, "American Copyright Law," p. 234.

X.

Unconscious and unintentional plagiarism is actionable just the same as if deliberate and intentional.

Sheldon v. *Metro-Goldwyn Corp.*, 81 Fed. (2nd) 49, 54.

XI.

Under the statute, compendia and derivative works are copyrightable.

U. S. Code, Title 17, sec. 5, note 31.

XII.

Originality in compiling a book does not mean an entirely new conception, but to avoid infringement a new compiler must "start from scratch" and do his own compiling without merely using the words of a copyrighted publication.

Adventures in Good Eating v. *Best Places to Eat*, 131 Fed. (2nd) 809 (C. C. A., 7th Cir.).

The Question of Infringement.

The really important question presented to the court, is whether or not respondent has infringed petitioner's copyrights. Before proceeding further, petitioner asks the Court to note that, whatever might have been the law under earlier statutes, mere compilations and compendia are now copyrightable (U. S. C. A. title 17, sec. 5, note 8, also sec. 6), and a copyright cannot be invalidated for want of novelty, as in the case of a patent. *Sheldon* v. *Metro-Goldwyn*, 81 Fed. (2nd) 49, 53. A compilation is subject to copyright even though it consists of material which itself is non-copyrightable. *Jewelers Circular* v. *Keystone Pub. Co.*, 281 Fed. 83; *Hartfield* v. *Herzfeld*, 60 Fed. (2nd) 599; *American Code Co.* v. *Benzinger*, 282 Fed. 829. The purpose of copyrights on compilations is "to prevent a subsequent laborer in the same vineyard from seeking to save time or trouble by copying his predecessor's work." Weil, "American Copyright Law," p. 234. The mere fact that respondent did not know that it was infringing petitioner's copyrights is immaterial for as the Second Circuit Court of Appeals said, in *Sheldon* v. *Metro-Goldwyn*, 81 F. (2nd) 54, "unconscious plagiarism is actionable quite as much as if deliberate" (Citing cases). Infringement is established by showing that substantial parts of petitioner's work were lifted by appellee (81 Fed. (2nd) 56). Complete identity between the original and the copy is not necessary to establish infringement (*De Montijo* v. *20th Century Co.*, 40 Fed. Supp. 133), and the test for determining infringement seems to be whether or not respondent made a "fair use" of petitioner's work (U. S. C. A. title 17, sec. 25, note 30).

Before proceeding to show similarities between the books copyrighted by petitioner and the matter appropriated by the respondent petitioner directs the attention of the Court to the following excerpts from the opinion of the Circuit Court of Appeals for the Eighth Circuit in the relatively recent case of *Ansehl* v. *Puritan Pharmaceutical Co.*, 61 Fed. (2nd) 131, which involved infringement of a copy-

right on an advertisement. The Court said, at pp. 136, 138:

> "The tendency of modern cases is to increase, rather than restrict, the subject matter of copyright. * * * The courts are disposed to extend copyright to any work involving labor or brain skill, without emphasizing originality or literary merit.
>
> "Since the plaintiff charges that the defendants copied his advertisements, it must be assumed that they did unless the two advertisements are so dissimilar as to negative completely that theory." * * * Copyright infringement may be predicated upon "the sequence and similarity of expressive ideas.
>
> "The test is whether one charged with the infringement has made an independent production or made a substantial and unfair use of the complainant's work.
>
> "It is not a question of quantity, but of quality and value; not whether the part appropriated is a literal copy of the original production but whether it is a substantial and material part.
>
> "Paraphrasing or copying with evasion is an infringement, even though there may be little or no conceivable identity between the two.
>
> "Had each of the two advertisements been an original production and their similarity a mere coincidence, there would have been no infringement of the plaintiff's copyright; but since the motion to dismiss concedes that the similarities which have been pointed out were the result of the use by the defendant of the plaintiff's advertisement, it necessarily follows that defendant's advertisement did infringe the plaintiff's copyright."

The case from which the quotation above was taken is one of the cases referred to in the concluding paragraph of Judge Major's opinion as holding what petitioner contends to be the correct rule of law, but which the Seventh Circuit Court of Appeals expressly overruled, evidencing the conflict of authority between two circuits upon the same legal proposition. The opinion said (Trans. 176):

> "To hold that an idea, plan, method or art described in a copyright is open to the public but that it can be used only by the employment of different words and

phrases which mean the same thing, borders on the preposterous * * *. Notwithstanding some authorities which support a theory permitting such a result, we think it is wrong and disapprove it."

Still other cases which are out of harmony with Judge Major's opinion are *Hartfield* v. *Peterson*, 2nd Cir., 91 Fed. (2d) 998, and *Donnelly* v. *Haber*, 2nd Cir., 43 Fed. Supp. 457.

Comparison of Petitioner's Books and Respondent's Copies.

It is obvious that respondent lifted and pirated verbatim much material and many words and phrases that petitioner used in his copyrighted books in describing the organization of a new mutual type company, the paying-in of working capital by a receiver (conservator, liquidator), out of the assets of a defunct company in the receiver's hands, the transfer of all the assets of the defunct company to a new company, and the reinsurance on an adjusted basis of all the policies of the defunct company by the new company. Petitioner's copyrighted books are "objects of explanation, expression, and direction" not "objects of use". Therefore, petitioner's explanations are properly the subject of copyright and there is infringement by respondent's republication and distribution of these explanations to the world at large. (*Taylor Inst. Co.* v. *Fawley-Brost Co.*, 138 Fed. 2d 98, 100.)

It can readily be seen that respondent appropriated and followed the key words of petitioner's material, adding some material at one time and place and deleting some material in other times and places to fit the individual situations and to obscure the piracy.

Petitioner, therefore, submits a few excerpts or quotations from his own publications, and parts of respondent's publications which appropriate petitioner's work, making use of the time-honored expedient of parallel columns.

Note: The insertion in italics of Old Company and New Company in petitioner's column and the deletions are made for the purpose of easier comparison.

From Appellant's Books.

(Trans. 109; Rec. 88.)

ASSETS OF PEORIA.

Receiver * * * agrees to * * * transfer * * * to the company (*New company*) all the properties of Peoria (*Old company*).

(Trans. 112-113; Rec. 88.)

* * * out of the assets of Peoria (*Old company*) there shall forthwith be * * * transferred to the Company, (*New company*) out of the property now in hand of the Receiver * * * the amount of Two Hundred Thousand Dollars ($200,000.00) for the purpose of providing the Company (*New company*) with a guarantee capital. * * *

(Trans. 112; Rec. 88.)

THE MUTUAL COMPANY.

The Company (*New company*) shall receive * * * out of the first assets transferred from the Receiver to the Company, (*New company*) a guarantee capital paid in and surplus paid in, in the amounts of two hundred thousand dollars ($200,000) and eight hundred thousand dollars ($800,000), respectively. * * *

From Appellee's Copies.

(Trans. 9; Rec. 14.)

TRANSFER OF ASSETS.

The Conservator agrees * * * to * * * transfer * * * to the New Company, the properties of the Old Company;

(Trans. 12-13; Rec. 16.)

The New Company agrees * * * to allocate * * * that portion of the assets conveyed * * * by the Conservator (other than the Three Million Dollars ($3,000,000) transferred to the New Company for its capital stock). * * * The said Three Million Dollars ($3,000,000) transferred to the New Company for its capital stock constitutes and shall constitute the capital and paid-in surplus of the New Company;

(Trans. 142; Rec. 21.)

The Commissioner will subscribe for and purchase with assets * * * held by him as liquidator of the Old Company all the authorized stock of the New Company for $3,000,000, which will thus establish the New Company with a paid-in capital of $1,000,000 and a paid-in surplus of $2,000,000.

(Trans. 110-111; Rec. 88.)

Any such policyholder who shall notify the Company (*New company*) of the Receiver in writing within one month after the date of this agreement that he does not elect to continue his policy with the Company (*New company*) under the terms hereof, shall have refunded such premium or premiums as may have been paid to the Receivers for the account of such policyholder on any such policy, less the net cost of term insurance at the attained age of the insured, for the period from the due date of the premiums paid to the Receiver, to the date of the receipt of notice by the Company (*New company*) from the policyholder of his election to have such premium refunded, * * *

(Trans. 10; Rec. 14.)

If any policyholder of the Old Company whose policy may be reinsured or assumed hereunder shall have paid his premium thereon to the Conservator subsequent to the effective date of this agreement, and shall thereafter elect to reject reinsurance and assumption of his such policy hereunder; and if the Court shall direct the Conservator or Liquidator to return said premium **(or the net premium** or premiums less charge for insurance service or collection charge or otherwise); **then** and in those events the New Company shall repay to the Conservator or Liquidator, on demand, said premium, or so much thereof as the Court may have ordered returned by the Conservator or Liquidator, as aforesaid.

(Trans. 38; Rec. 35-36.)

A New Mutual Company, (hereinafter referred to as the Mutual Company) shall be organized as a purely mutual legal reserve life insurance company, under the name of Detroit Mutual Life Insurance Company, or such other name as may be selected and allowed.

The plan shall provide that the Mutual Company as a consideration of the assumption and payment of certain liabilities of the Old Company, and for a continuation of insurance policies of the Old Company on a readjusted basis, shall acquire assets of the Old Company suf-

(Trans. 142; Rec. 21.)

The Commissioner, as liquidator, and as such vested with title to all of the properties and assets of the Company, will organize a new corporation (hereinafter referred to as the 'New Company') under the laws of California for the purpose of conducting a life and accident and health insurance business. The New Company will have an authorized capital of $1,000,000 consisting of 10,000 shares of the par value of $100 per share, all of one class. Although a stock company, it will be authorized to issue participating policies on a legal reserve basis. The directors of the New Com-

ficient to meet the policy and other liabilities assumed and an operating capital or surplus fund sufficient to qualify it under the laws of the State of Michigan, to transact the business of life insurance on a mutual legal reserve basis.

THE OPERATING CAPITAL OR SURPLUS FUND so acquired by the NEW MUTUAL COMPANY will be entirely owned by the policyholders of the OLD COMPANY, who become the policyholders of the NEW MUTUAL COMPANY, * * *.

(Trans. 65; Rec. 56.)

A NEW COMPANY is to be organized under the laws of the State of Illinois under the name 'ILLINOIS MUTUAL LIFE INSURANCE COMPANY,' or such other name as may be selected or allowed by the Director of Trade and Commerce of the State of Illinois (hereinafter called the NEW COMPANY).

It is intended to vest in the NEW COMPANY the business of the OLD COMPANY, and all of the properties and assets of the OLD COMPANY, as may be ultimately determined.

(Trans. 112-113; Rec. 88.)

Immediately upon the execution of this agreement out of the assets of Peoria there shall forthwith be paid and transferred to the Company, out of

pany will be selected and approved by the Commissioner. The Commissioner will subscribe for and purchase with assets or funds held by him as liquidator of the Old Company all of the authorized stock of the New Company for \$3,000,000, which will thus establish the New Company with a paid-in capital of \$1,000,000 and a paid-in surplus of \$2,000,000. The stock of the New Company thus issued to the Commissioner as liquidator of the Old Company will be held by the Commissioner subject to the ultimate mutualization of the New Company, as hereinafter provided.

(Trans. 142-143; Rec. 21.)

All of the properties and assets formerly owned by the Old Company and held by the Commissioner as its liquidator will be transferred and conveyed to the New Company, with the exception of the stock of the New Company * * *.

(Trans. 8; Rec. 13.)

"Properties of the Old Company" shall mean * * * all * * * assets * * * owned by the Old Company at the time of the appointment of the Con-

the property now in the hands of the Receiver cash and/or securities, and/or mortgages in the amount of Two Hundred Thousand Dollars ($200,000.00) for the purpose of providing the Company with a guarantee capital as required by the laws and statutes of the state of Illinois for the operation of a legal reserve mutual life insurance company, also having authority to transact the business of accident and health insurance.

(Trans. 112; Rec. 88.)

THE MUTUAL COMPANY.

The Company (*New Company*) has been organized as a mutual legal reserve life insurance company under the laws of the state of Illinois for the purpose of assuming and continuing the policies of Peoria, and for the purpose of conserving the assets of Peoria for distribution to claimants under policies, and pursuant to and in consideration of such undertaking the Company shall receive and be paid out of the first assets transferred from the Receiver to the Company, a guarantee capital paid in and surplus paid in, in the amounts of two hundred thousand dollars ($200,000) and eight hundred thousand dollars ($800,000), respectively, as hereinafter provided.

servator which shall not have been applied by him against his subscription for stock of the New Company * * * plus all property acquired by the Conservator * * * except (a) the stock of the New Company held by him, * * *.

(Trans. 145; Rec. 22.)

MUTUALIZATION OF NEW COMPANY.

As soon as legally possible, the New Company and the Commissioner, as the holder of all of the outstanding stock of the New Company, shall prepare and present to the policyholders of the New Company a plan for its voluntary mutualization in accordance with the laws of the State of California, as then in effect. Such mutualization plan shall contain such terms and provisions not inconsistent with this plan and agreement, as may be required by law or approved by the Commissioner and the New Company. The purchase price paid by the New Company for the acquisition of its outstanding stock pursuant to such mutualization plan to the extent not required for the satisfaction of item (c) of paragraph 4 above shall be repaid to the New Company.

(Trans. 103-104; Rec. 86.)

MORATORIUM ON CASH AND LOAN VALUES OF POLICIES, COUPON AND DIVIDEND ADDITIONS AND ACCUMULATIONS? SUPPLEMENTARY CONTRACTS AND TRUST FUND AGREEMENTS FOR MONEY LEFT IN TRUST.

The reinsurance and assumption of obligations herein provided for shall further be subject to the condition and limitation that until December 31st, 1938, or for such lesser period as may be prescribed by the Board of Directors of the Company, the cash surrender values and cash loan values of any Peoria policy * * * shall not be available to the holder of such policies * * * assumed hereunder (except that part of any such value as may be applied to the payment of premiums on any policy on which the value is used, or on any other policy or policies insuring the same life).

This provision shall not apply to any increase in the cash value or the loan value created out of premiums, or parts of premiums, or policy loan payments, paid in cash to, or received by, the Company or the Receiver subsequent to the effective date hereof. * * *

(Trans. 155; Rec. 27.)

MORATORIUM.

The reinsurance and assumption of obligations by the New Company herein provided for are subject to the condition that the new Company shall not be required, prior to sixty (60) days, and such additional period as may be determined by the Commissioner, from and after the effective date of this agreement, to make policy loans (except for the purpose of paying premiums on the same policy or on additional policies issued on the same life), or to pay cash surrender values.

This provision, however, shall not apply to any increase in values that are accumulated from premium payments or loan repayments which are received subsequent to the date of liquidation.

(Trans. 99; Rec. 85.)

REINSTATEMENT OF LAPSED POLICIES.

The Company (*New company*) will reinstate and assume any Peoria policy lapsed

(Trans. 11; Rec. 15.)

REINSTATEMENT OF LAPSED POLICIES.

The New Company will also reinstate, during the life-time of the insured * * * without

on or since the effective date hereof, provided written application for reinstatement is made while living, by the policyholder, * * * except that no evidence of insurability shall be required. Such right of reinstatement of any policy shall continue until two months after the date of this agreement.

* * * Subject to the payment of any premium or part of any premium, due and unpaid. * * * Upon such reinstatement of any lapsed Peoria policy, it shall for all purposes be treated the same as if it had been in force on the effective date hereof.

(Trans. 110; Rec. 88.)

* * * the Receiver shall likewise transfer and deliver to the Company (*New company*), the full amount of all premiums paid to the Receiver, for the account of policies of Peoria. * * *

(Trans. 110; Rec. 88.)

All premiums on any policy assumed hereunder paid to the Receiver on or after the effective date hereof shall be credited by the Company (*New Company*) to the account of such respective policy or policies.

evidence of insurability, any of the policies reinsured and assumed * * * which have lapsed since the effective date of this agreement, upon written application therefor by the insured and the payment of all premiums in arrears, if such application is made * * * within seventy-five (75) days after the entry of the order of the Court approving this agreement. Upon the reinstatement of such lapsed policy it shall, for all purposes, be treated * * * the same as if it had been in force on the effective date of this agreement. * * *

(Trans. 9-10; Rec. 14.)

The Conservator shall transfer and deliver to the New Company the full amount of all premiums on any policy * * * which have been paid to the Conservator.

(Trans. 9-10; Rec. 14.)

* * * all premiums on any policy * * * assumed hereunder * * * paid to the Conservator on or after the effective date of this agreement. * * * the New Company shall credit the holder of such policy with the payment of such premiums accordingly. * * *.

Conclusion.

The final decree of the District Court was upon a motion to dismiss, and for the purposes of that motion, respondent admitted the truth of every well-pleaded allegation in the complaint including, of course, the averments of par. 6 of the complaint (Trans. 4; Rec. 6) that respondent had copied and pirated petitioner's books. Rule 9, F. R. C. P. clause *d*, provides that in pleading an official act it is sufficient to aver that the act was done in compliance with law. Petitioner, therefore, did not have to allege each and every preliminary step taken or performed by him, such as citizenship, payment of fees, deposit of copies in the Library of Congress, etc., for it will be presumed, under this rule and clause, that when the Register of Copyrights issued the certificates, the law was fully complied with, not only by the Register of Copyrights but by the appellant too. These same presumptions would have applied under the old equity rules of 1912, as well as under the present Federal Rules of Civil Procedure.

In the District Court and in the Circuit Court of Appeals respondent contended (and presumably will again do so in this Court), that it was entitled to infringe petitioner's copyrights with impunity merely because the infringing matter had to be submitted to a California court for judicial approval. This proposition of law is so preposterous as to deserve no comment. It is true that law reports, syllabi written by judges, and some other items can not be copyrighted (U. S. C. A. title 17, sec. 6, notes 2, 3, 4), but there are no decisions and probably never will be any holding that something which a litigant (not a court) happens to write is immune from the operation of the Copyright Act.

The District Court's opinion intimated that the real infringer was someone other than respondent, possibly Car-

penter, the Insurance Commissioner of California, who entered into a certain contract with respondent, but lost sight of the fact that it was respondent, not the Commissioner, who published and distributed several hundred thousand copies of what petitioner claims to be infringements of his copyrights.

Conceding, moreover, that respondent could have prepared its contract or other legal documents, and filed the same in court, and that parties in interest could have consulted the court records or obtained copies from the Clerk, and that by so doing respondent would not have infringed anybody's copyrights; but when respondent published many hundreds of thousands of copies of these contracts in its magazine and distributed them to the world at large, respondent did thereby infringe.

Petitioner does not now and never did contend that when respondent was adjudged insolvent, it was precluded from taking every step and following every idea and every suggestion promulgated in petitioner's copyrighted works. Respondent had the right to reorganize and to do each and every act which the copyrighted works even remotely suggest. That is one thing, but it was an entirely different thing when respondent copied, pirated and published what petitioner had written. Respondent also had the right to prepare, publish, and use various reinsurance contracts, but had no right to employ petitioner's material. The situation in this respect is exactly like that presented in the very recent case of *Adventures in Good Eating* v. *Best Places to Eat*, 131 Fed. (2nd) 809, 811, in which the opinion said:

> "In reviewing this finding we have very carefully examined the two books. * * * The books bear a resemblance to each other, and the phraseology in many instances is strikingly similar. Defendants seek to explain the similarity in wording as the logical result of the copying by both plaintiff and defendants of menus supplied by the restaurateurs listed in the books—that naturally and inevitably the same listing

of prices, of specialties in food, and unusual features of the respective places would occur when the menus were used as source material in making up the copy. We are not convinced that this suggestion would explain the existence of such close and parallel wording, and especially would it not explain the substantially same selection of places listed in the respective books."

For respondent to have distributed thousands of copies of its own "Rehabilitation Agreement" and its own "Pacific Mutual News" was a clear violation of petitioner's copyrights. That, and nothing else, is what this suit is about.

Petitioner contends that if a doctor should write a book telling how to treat and cure a certain disease, other doctors may administer the same remedies and follow the same treatment set forth in the book; but further contends that no one else has the right to pirate and publish the book itself just because the public is free to follow the book's directions. The same thing is true, for example, of a book on cookery, on the manufacture of a chemical, on the performance of a metallurgical process, on the trial of a lawsuit, or on any one of countless other human activities. Freedom to do what such books direct is not freedom to copy the books themselves—at least it was not until the courts below so held in this case.

Books, after all, are only collections of words, and a copyright protects the arrangement of words selected and used by an author. The right to do what the book tells is one thing; the right to use the words as arranged by the author is another and entirely different thing; and the right to do the first thing does not confer the right to do the second.

The case of *Baker* v. *Selden*, 101 U. S. 99 (Trans. 174), is not in point, because that litigation dealt with account books, prepared and ruled in a particular manner, but did

not in any manner deal with *words,* as in the case at bar. *Baker* v. *Selden* involved a mechanical art, not literature or literary property. If there was any protection at all available to the plaintiff in that case, it was under the patent laws, not the statutes then in force pertaining to copyrights, and it was not contended that the alleged infringer used any words or arrangements of words of which the plaintiff therein was the author. The present litigation deals wholly and exclusively with word material—something entirely different from charts of ruled lines (as in *Taylor Inst. Co.* v. *Fawley-Brost Co.,* 139 Fed. 2d 98, cited in Judge Major's opinion), or with ledgers, journals, or other bookkeeping devices (as in *Baker* v. *Selden*). Nevertheless, in the Taylor case Judge Major clearly recognized that objects of explanation and direction as distinguished from objects of use, are copyrightable and this is precisely the category into which petitioner's copyrighted works belong.

As Mr. Justice Brown observed in the famous case of *Washburn & Moen Mfg. Co.* v. *Beat 'Em All Barbed Wire Fence Co.,* 143 U. S. 275, 36 L. Ed. 154, 158, in the law of patents, "it is the last step that wins," citing and relying upon such cases as *Webster Loom Co.* v. *Higgins,* 105 U. S. 580, 26 L. Ed. 1177, *Consolidated S. U. Co.* v. *Crosby,* 113 U. S. 157, 179, 28 L. Ed. 939, 946, and *Smith* v. *Goodyear,* 93 U. S. 486, 495, 23 L. Ed. 952. In the instant case, therefore petitioner made the last step when he wrote the books showing the world how to rehabilitate an insolvent life insurance company out of its own assets. Respondent, in preparing its own plans, proposals, and contracts copied and pirated much of what is found in petitioner's four copyrighted publications, being induced to do so in all probability by the fact that petitioner was the first one to express in words these formulae for thus reorganizing an insolvent life insurance company. Obviously, petitioner took

the last step and the winning one when he expressed those ideas in words, and when respondent chose to use those words in its own printed matter, the result was an infringement of petitioner's copyrights for which infringement respondent should be compelled to answer and account.

The judgment of the Circuit Court of Appeals affirming the order of the District Court should be reversed and the cause remanded to the courts below for further proceedings.

Respectfully submitted,

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